IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Bail under and in terms of Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929 as amended by Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

Court of Appeal Case No.
CA/BAL/0311/2024

High Court of Colombo
Case No. 4389/23

The Officer-in-Charge,
Police Narcotics Bureau,
Colombo 01.

Complainant

Vs.

Nandakumar Shivanandan.

Suspect

AND NOW BETWEEN

Shivanandan Divya.
207/05/D, Batalandahena,
Gothatuwa.

Petitioner

Vs.

1. Officer in Charge,
   Police Narcotics Bureau,
   Colombo 01.

2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Complainant-Respondents

BEFORE : **P. KUMARARATNAM, J.**
K.M.G.H. KULATUNGA, J.

COUNSEL: Asthika Devendra with Aruna Madushanka for the Petitioner.
Oswald Perera, SC for the Respondents.

INQUIRY ON: 18.02.2025

DECIDED ON: 21.03.2025

K.M.G.H. KULATUNGA, J.

ORDER

1. This application for bail is preferred under Section 83 (2) of the Poisons, Opium and Dangerous Drugs Ordinance, on behalf of the accused, Nandakumar Shivanandan. According to the Petitioner the said accused was arrested on 03.06.2022 for a narcotics offence.

2. Now the accused stands indicted in the High Court of Colombo with five counts. The 1st to 4th counts are for the possession and trafficking of 24.60 grammes and 454 grammes of pure heroine. The 5th count is a money laundering count in respect of Rs. 782,000.00. The main ground

of exceptionality as urged by the Counsel is that the version of the prosecution is false and improbable.

3. It was submitted that, as per the reports filed in the Magistrate's Court, the accused had been apprehended on information. However, at the point the Narcotics Officers met the accused, there was nothing in his possession. The first recovery had been made in the house allegedly occupied by the accused in an almirah, of which the key was with the accused (24.60 grammes). The second recovery was made thereafter, based on a telephone message received to the accused's phone while he was held in the Police Station.

4. The learned Counsel for the petitioner submitted that as far as the second recovery is concerned the Investigating Officer has himself noted that it was not in the exclusive possession of the accused. As for the first recovery, it was submitted that the accused denies any recovery from his house or his almirah. The learned Counsel submitted that if the almirah was opened with a key found in the possession of the accused, that key should necessarily be a production, which according to the list of productions, is not so.

5. Apart from the said improbability, the learned Counsel also submitted that there is a delay which is excessive, in support of which he submits that the indictment is dated 08.06.2023, which appears to have been served thereafter and upon several pre-trial dates, the trial has in the first instance been scheduled for 30.07.2024. The trial had not commenced as scheduled, and similarly on 27.09.2024, 13.11.2024, and 15.01.2025, the matter has been set for trial but had been postponed. Mr. Asthika Devendra for the petitioner, submitted that as per his instructions, the postponements on all four occasions were due to the absence of witness No. 01. The Counsel then submitted that such delay due to the absence of the witness is an oppressive delay. He did admit of a previous conviction for being in possession of cannabis.

6. In opposition to this application, the learned State Counsel submitted that he does not have the precise reasons for the postponements. However, he submitted that the Attorney General has made every endeavour to expeditiously send out the indictment which had been done within one year of the arrest. He did, in a subtle way, concede that the amounts of heroin referred to in counts 3 and 4 may not have been in exclusive possession, but as for counts 1 and 2, it was found in an almirah of which the key was in the possession and the same was opened by the accused.

7. Mr Oswald Perera, State Counsel, emphasized that this is a commercial quantity as the gross amount recovered was 766.33 grammes though the pure quantity is 24.60 grammes. He further emphasised that the previous conviction of the accused was in respect of possession and trafficking of 387.753 kg of cannabis and for the possession of a revolver for which he had been convicted in HC Colombo under Case No. 2892/2021, for which a one-year jail term for each imposed had been suspended for ten years (this is admitted at paragraph 30 of the Petition). Further, it was submitted that the present offence was committed during the operational period of the said sentence. In addition to the conviction in Sri Lanka, the accused is said to have a previous conviction in India (on 25.01.2006) for the possession of 2.7 kg of heroin, for which he is alleged to have served a sentence of ten years. The details of both these previous convictions are stated in the objections filed and supported by an affidavit. The State Counsel also submitted that the accused has a matter pending in MC Colombo under B44375/2021, in which he is the 18th suspect. It is in respect of 4.47kg of heroin, 5.945kg of methamphetamine, and 3g of cannabis. However, the State Counsel conceded that he did not have the information as to the actual reasons for the postponements of the High Court case.

8. As for the improbability of the prosecution's version, in the normal course, when there are competing versions, it is a trial issue required

to be considered by the trial judge. However, if there be a glaring contradictory position or a blatant improbability on the version of the prosecution, it may be considered in an application of this nature as being a circumstance that is exceptional. In this instance, it is no more than two competing versions. The crux of the petitioner's statement is that this was an introduction and a false implication. The petitioner himself adverted to the fact that the Investigating Officer has himself expressed the view in his notes that the second recovery was not in exclusive possession of the accused. However, the Attorney General has thought otherwise and included two charges, notwithstanding the said observation. What is important and significant, is that the Arresting Officer's said observation clearly demonstrates an appreciable sense of detachment and impartiality in conducting this investigation. It is this same Officer who adverts to the fact of this initial recovery. On the other hand, if the Investigating Officer, had falsely foisted the narcotics, one would, in the normal course, expect him to simply state that the same was found in the personal possession of the accused at the point of apprehending the accused in the first instance. This by itself tends to exclude any inference of a false implication. Therefore, I see no inherent improbability of the prosecution's version on the available material.

9. The journal entries or proceedings after 25.04.2024 are not made available. Accordingly, the documents do not provide any information as to the reasons for the postponements between 30.07.2024 and 15.01.2025. In this backdrop, considering the commercial quantity and the fact that the accused is alleged to have committed the present offence during the operational period of a suspended sentence becomes very relevant. To cap it all, it is alleged that there is a previous conviction against him by an Indian Court, and also another pending matter in the Magistrate's Court of Colombo.

10. That being so, this offence is alleged to have been committed during the operational period of a suspended sentence. The said previous

conviction is for a similar offence (cannabis) and also for the possession of a firearm. What is relevant is that this offence was committed during the operational period of the suspended sentence. A person who is subject to a suspended sentence is required to conduct himself in such a manner to avoid the commission any subsequent offence at least during the operational period. If so, he would be liable to suffer and serve the sentence so suspended.

11. When a person is alleged to have committed a subsequent offence during the operational period it also exhibits a tendency to reoffend or commit or to get involved in criminal activities with impunity. This also may be viewed as acting in contemptuous disregard of the authority of such Court and a total disregard of the second chance so afforded. The alleged commission of a subsequent offence, if true, is extremely serious. 24.60g of pure heroin is a commercial quantity.

12. Section 83 as amended by the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 41 of 2022 reads thus;

> *83. (1) Subject to the provisions of sections 84, 85 and subsection (2) of this section, a person suspected or accused of an offence under sections 54A and 54B of this Ordinance, shall not be released on bail by the High Court except in exceptional circumstances.*
>
> *(2) Notwithstanding the provisions of sections 84 and 85, a person suspected or accused of an -*
>
> > *(a) of which the pure quantity of the dangerous drug, trafficked, imported, exported or possessed is ten grammes or above in terms of the report issued by the Government Analyst under section 77A; and*
> > *(b) which is punishable with death or life imprisonment,[sic] shall not be released on bail except by the Court of Appeal in exceptional circumstances.*

(3) For the purposes of this section "dangerous drug" means Morphine, Cocaine, Heroin and Methamphetamine."

13. This provision in the first instance requires that persons suspected of offences involving over 10 grammes or more of pure narcotics is required to be denied bail. This is couched the mandatory form. However, a discretion is then conferred to consider bail in exceptional circumstances. This provision does not create an entitlement as of right to obtain bail by establishing exceptional circumstances. Correspondingly a discretion is conferred on Court to consider bail. The end result is that making out exceptional circumstances *per se* will neither entitle a suspect as of a right to be enlarged on bail nor compel this Court to grant bail. It is a discretion that is conferred.

14. In the exercise of the said discretion when exceptional circumstances are made out, this Court (if brought to its notice) may consider other factors such as flight risk, propensity of reoffending or absconding and if there be such circumstances, bail may not be granted even if exceptional circumstances are made out. Presence of exceptional circumstances will not *ipso facto* mandate the granting of bail.

15. Section 83(2) applies to a very limited category of narcotic offences, where bail is denied unless the persons who are suspected or charged with these offences are able to demonstrate exceptional circumstances. As I see, the Legislature has by special bail provisions in Section 83(2) established an effective bail system for specific narcotic offences for which the normal bail regime would not suffice and allow the continuity of the criminal behaviour and the risk of absconding. This is primarily in view of the unique nature and attributes of the narcotics offences. Unlike most other run of the mill type of offences, most narcotic offences are committed in a very different context. For instance, trafficking in narcotics occurs systematically, usually in a highly sophisticated and organised manner, that is

extremely lucrative. This by itself is a huge incentive for an offender to continue with the criminal behaviour even after arrest and release on bail. Then in view of the serious penal sanctions that may entail there is also the appreciable and real danger of such accused or suspects absconding.

16. In the above premises, even if the petitioner is deemed to have established exceptional circumstances, as the other circumstances establish a propensity to reoffend the accused is not entitled for bail under Section 83(2). Accordingly, this Court is left with no option but to refuse and reject this application.

17. No doubt, as submitted by Mr. Asthika Devendra, even if there had been four postponements, the High Court Judge had set remarkably short dates. Now the matter is fixed for trial on 20.03.2025. In that context, the delay is not significant to be considered as being exceptional. In the above premises this Court is left with no option but to refuse and dismiss the application for bail.

Application is accordingly dismissed and the Registrar of this Court is directed to transmit a copy of this order to the Registrar of the High Court of Colombo and the Officer in Charge of the Police Narcotics Bureau.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL